Supreme Court, U.S.
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No. 85-899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,

Petitioner,

v.

WILLIAM BARRETT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

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BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Whether an accused who is in custody, and who has clearly requested counsel prior to making a written statement, has invoked his right to counsel requiring a cessation of interrogation until an opportunity to confer with counsel is afforded him?

Whether an accused's right to counsel is violated when, prior to interrogation he informs the police that he wants nothing in writing prior to speaking with an attorney and the police proceed to interrogate the accused and promptly thereafter reduce his statements to writing?

Whether an ambiguous request for counsel which is ambiguous with regard to certain conditions requires either a cessation of interrogation or, at a minimum, a clarification of the conditions and the ambiguities prior to proceeding with interrogation?

Whether under all the circumstances, the respondent's statements to the police were voluntary?

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CONSTITUTION AND STATUTES:

United States Constitution

Fifth Amendment	*passim*
Fourteenth Amendment	*passim*

STATEMENT OF THE CASE

On October 23, 1980, the respondent, William Barrett, was arrested and taken into the custody of the New Haven, Connecticut Police at approximately 11:30 p.m., (TR 230-232) as the result of the allegations of M.J., to the effect that the respondent had sexually assaulted her.

The respondent was transported to the Wallingford Police Station by Wallingford Police officers at approximately 5:30 a.m. on the morning of October 24, 1980. (JA 5A, 6A) He was advised of his rights, pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966) at 6:12 a.m. (J.A. at 8A) At that time, the respondent appeared to be disheveled, physically injured and upset. (J.A. at 17A) The police were aware that the respondent had never been arrested before and was unfamiliar with police procedure.[1]

Upon being advised of his *Miranda* rights, the repondent refused to give a written statement until his attorney arrived. (J.A. at 21A) He stated "he would give no written statement to the police, nothing in writing." (J.A. at 21A) The Wallingford Police officers interviewed the respondent at this point, unsuccessfully attempting to tape-record the interview. (J.A. at 26A)

Upon discovering the malfunctioning of the tape recorder the Wallingford Police interviewed the respondent a second time, again, unsuccessfully attempting to tape-record the interview. (J.A. at 27A-34A) Prior to the second interview, the respondent stated, "he did not want to put anything in writing until his attorney came." (J.A. at 44A)

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[1] *State* v. *Barrett*, 197 Conn. 50, 57 ftnt 9.

Subsequently, three officers reduced the respondent's statement to writing by filing written reports containing the respondent's statement.[2] At no time was the respondent told that the police officers were attempting to record the interview. (J.A. at 28A, 63A)

The trial court denied the respondent's motion to suppress the statements made by the respondent during the custodial interrogations. (J.A. at 70A, 71A) Eventually, two of the officers testified at trial, having reviewed their written reports containing the respondent's alleged statements made more than two years earlier. (J.A. at 90A, 91A; TR. 718-720) The respondent was convicted of *inter alia*, Sexual Assault, First Degree, C.G.S.A. § 53a-70(a), and committed to the Commissioner of Corrections for a total period of incarceration of not less than nine (9), nor more than eighteen (18) years. (J.A. at 3A, 4A)

Upon appeal, the Connecticut Supreme Court set aside the judgment and ordered a new trial on the grounds that the statements of the defendant were inadmissible, and that they had been obtained in violation of his rights under the cases of *Miranda*, *supra* and *Edwards* v. *Arizona*, 451 U.S. 477 (1981).[3]

SUMMARY OF ARGUMENT

Under the decision of this Court in *Edwards* v. *Arizona*, 451 U.S. 477, Reh. denied, 452 U.S. 973 (1981), once an accused has invoked his right to counsel, that right cannot be waived unless the accused himself initiates further conversations with the police. In the case of *State*

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[2] States Exhibit A, B, and C for purposes of the suppression hearing only, Tr. 422, 426, J.A. 89A, 90A, 91A, 92A.

[3] *State* v. *Barret* at 60.

v. *Barrett*, 197 Conn. 50, 495 A.2nd 1044 (1985), the Connecticut Supreme Court ruled that a defendant had invoked his right to counsel when he indicated a desire to confer with counsel prior to putting anything in writing.

When a respondent makes such a request and evidences an intent to protect and preserve his Constitutional Rights under the Fifth Amendment, he is not subject to further interrogation unless he is afforded an opportunity to confer with counsel or unless he himself initiates further conversations with the law enforcement officers involved.

In any event, the police officers involved in this case did not take the necessary steps to preserve the respondent's Constitutional Rights. They failed to cease their interrogation of the respondent when he requested the opportunity to confer with counsel. They failed to honor his request for counsel prior to putting anything in writing. If, as the petitioner claims, respondent's request did not require the cessation of all interrogation, certainly it required the police officers to refrain from taking any statements which they intended to reduce to writing prior to affording the respondent the opportunity to confer with counsel.

When a request for counsel is made by an accused which is less than all-encompassing or less than entirely clear, police officers have an obligation to either cease the interrogation or, at a minimum, to clarify the request of the accused. In the case at bar, police officers did neither. Rather, the officers took it upon themselves to interpret the request in the most narrow fashion possible and then proceeded to do everything possible to circumvent the intent of the respondent to afford himself some protection through counsel.

At a minimum, the trial court should have taken the respondent's request for counsel into consideration in determining whether or not his alleged waiver of his Fifth Amendment rights was truly a knowing waiver. The trial court failed to consider this a factor and, therefore, erred in not suppressing the testimony of the police officers involved.

ARGUMENT

I. THE RESPONDENT'S ALLEGED STATEMENTS WERE INADMISSIBLE BECAUSE THE RESPONDENT HAD MADE A CLEAR REQUEST FOR COUNSEL AND NEVER WAIVED HIS RIGHT TO COUNSEL.

As the Connecticut Supreme Court held, there was neither ambiguity nor indecisiveness concerning the fact that the respondent had requested counsel to assist him in protecting his Constitutional Rights against self-incrimination.[4] The *Miranda* Court made clear the procedure which law enforcement officers were required to follow subsequent to informing one of his rights.

> "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda, supra at 474.

The words "in any manner" have long been the hallmark of an individual's ability to invoke his right to counsel under the *Miranda* decision. See e.g. *United States* v. *Franzen*, 653 F.2d 1153(7th Cir. 1981); *White* v. *Finkenbeiner*, 611 F.2d 186, 189 (7th Cir. 1979). The invocation of

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[4] *Id.* at 56.

a condition with the request for counsel in no way results in a waiver of that right.

Once the right to counsel has been invoked in any manner, the decision of this Court in *Edwards* v. *Arizona*, *supra* is controlling. Having invoked his right to counsel, a defendant is not subject to further custodial interrogation even if he has been advised of his rights "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police" *Edwards*, *supra* at 484, 485. Clearly, in the case at bar, the respondent did not initiate any further communication with the police. In fact, there was no break at all in the interrogation of the respondent.

The facts in the *Edwards* case are also instructive. The petitioner in the *Edwards* case was willing to make a statement so long as it was not tape recorded. The police informed the defendant that the tape-recording was irrelevant since they could testify in open court as to whatever he said. While the holding in *Edwards* stems from the invocation of the right to counsel earlier than this conversation, notably in the *Edwards* case, the officers took the time to explain that there was no legal or substantive difference between an oral statement and a tape-recorded statement. Nonetheless, this Court held that any statement so obtained was inadmissible. In the case at bar, the officers did not even attempt to explain to the respondent that the dichotomy drawn by him between the written statement and the oral statement, indicated a blatant lack of understanding of his right and of the warning given.

The *Miranda* Court itself noted that there can be no meaningful distinction between a formal confession and statements which may later amount to admissions.

> "No distinction can be drawn between statements which are direct confessions and statements which

> amount to 'admissions' of part or all of an offense . . . Similarly . . . no distinction may be drawn between inculpatory statements and statements alleged to be merely exculpatory."

Miranda, supra at 476.

The case at bar does not present a situation where the respondent was equivocal as to whether or not he wanted counsel. In the case at bar, the respondent stated unequivocally that he did want counsel. Compare, *People* v. *Krueger*, 412 N.E.2d 537 (Ill. 1980); *People* v. *Superior Court*,542 P.2d 1390, 1394-1395 (Cal. 1975); *cert denied*, 429 U.S. 816 (1976); and *People* v. *Rafac*, 364 N.E.2d 991 (Ill. App. 3d 1977). In the cited cases, the defendants expressed equivocation about whether or not they wanted counsel. However, in the case at bar, there was no such equivocation. The respondent, having expressed his desire to have an attorney assist him in the protection of his rights, the Wallingford Police were obliged to cease all questioning until counsel was present or, under *Edwards*, until the respondent himself initiated a conversation. This they failed to do.

In the case of *Ochoa* v. *State*, 573 S.W.2d 796 (Tex. Crim. App. 1978), the defendant, during the course of police interrogations stated, "well I will talk to you but I don't want to sign anything". Relying on the "in any manner" language of *Miranda*, the Texas Court of Criminal Appeals held that such a statement must be construed as invoking a criminal defendant's Fifth Amendment rights requiring cessation of all interrogation, unless such interrogation is subsequently initiated by the defendant. *Ochoa, supra*, at 800-801.

Recent cases of this Court cited by the petitioner as requiring a contrary result are inapposite. In the case of *Wyrick* v. *Fields*, 459 U.S. 42 (1982), the defendant

clearly intiated the discussion with the police after he had been afforded the opportunity for counsel. Likewise, in the case of *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983), the defendant, after having invoked his right to counsel clearly initiated further discussions with the police. In the case at bar there is no question that the respondent was not the initiator of discussion with the police. *Solem* v. *Stumes*, 104 S.Ct.1338 (1984) is also not controlling, having been decided on the issue of retroactivity.

II. THE POLICE DID NOT HONOR THE RESPONDENT'S REQUEST FOR COUNSEL WITHIN ITS LIMITED SCOPE.

The petitioner's argument is two-fold. First, the petitioner argues that a request for counsel, which is not all-encompassing but is somewhat limited in scope, does not require a cessation of interrogation prior to an opportunity to obtain the advice of counsel. This argument has been dealt with in the previous section.

Second, the petitioner argues that because the police "scrupulously" honored the respondent's request for counsel within its scope, the statements obtained are admissible. The argument is based upon a faulty assumption and, therefore, collapses from its own weight.

For example, the petitioner's brief states that the respondent chose "to limit the protection to the execution of a legal document". *Brief of the Petitioner*, at Page 10. But, this is not what the respondent requested. The Brief of *Amici Curiae Alaska, et al.* states that, "the defendant clearly, and unequivocally, indicated that he would not *sign* a written statement without an attorney." *Brief of Amici Curiae Alaska, et al.*, at 3. (emphasis added). But, this is not what the respondent requested.

According to the testimony of Officer Cameron, the respondent stated that "he would give no written statement to the police; *nothing in writing*." (J.A. at 21A) (Emphasis added) According to the testimony of Lieutenant Howard, the respondent stated, "he did not want to put anything in writing." (J.A. at 44A)

But, in fact, the Wallingford Police, in direct contradiction to the respondent's request, did reduce his statements to writing only an hour after the second interview. (J.A. at 90A) It is the petitioner's claim that the respondent's words "nothing in writing" mean "I will not sign a written document." However, the only fair import of the respondent's words is that there would be no written memoranda evidencing the conversation. The testimony of the officers at trial was based almost entirely on the writings made by the Wallingford Police allegedly memorializing the respondent's statements. (J.A. at 91A) Nothing respondent said can be fairly interpreted as limiting the scope of his request so narrowly as to preclude only his signature on a "legal document."

III. AT A MINIMUM, THE LIMITED SCOPE OF THE RESPONDENT'S REQUEST FOR COUNSEL WAS AMBIGUOUS.

While the respondent contends that the words "nothing in writing" mean just what they say, any argument by the petitioner to the effect that written police reports, including the statements of the respondent, were permissible can, at best, lead to the conclusion that the limitation on the scope of the request was ambiguous.

For example, did the respondent's request mean that the police could make a writing contemporaneous with the interrogation so long as they did not ask him to sign? Did it mean that, while no contemporaneous writing was

permitted, a writing memorializing the statements that the respondent made shortly after the interrogation was permitted? Did it mean that, while no writing was permitted, some other permanent record of the statement could be made (i.e. tape-recording)? In any event, it was a writing memorializing the statements of the respondent which enabled the officer to testify at trial. Certainly, this is one potential ramification of the statement that the respondent would have wanted to discuss with counsel.

While the respondent clearly requested counsel, this Court may determine that the limitations placed on the request rendered the request, or the scope of the request, ambiguous. The ramifications of an ambiguous request have yet to be determined by this Court.

In *Smith* v. *Illinois*, 105 S.Ct.490 (1984), this Court declined to determine precisely what the consequences of an ambiguous request for counsel should be. The Court, however, noted that lower courts have generally taken three approaches to the problem of an ambiguous or equivocal request for counsel. See *Smith*, *supra* at 493, footnote 3.

Some courts have held that all questioning must cease upon any request for counsel, however equivocal or ambiguous. *People* v. *Superior Court*, 542 P.2d 1390, 1394-1395 (Cal. 1975)*cert. denied* 429 U.S. 816 (1976); *People* v. *Rafac*, 364 N.E. 2d 991 (Ill. App. 3d 1977). Clearly, if this Court chooses to adopt this standard, then the statements of the respondent must be held to be inadmissible.

Other courts have attempted to define a threshold standard of clarity for such requests and have held that requests falling below this threshold do not trigger the right to counsel. See, e.g. *People* v. *Krueger*, *supra* at 540.

Even if the Court determines that this standard ought to be adopted, the respondent's statements meet any reasonable threshold standard of clarity. The respondent did not express doubt as to whether or not he wanted an attorney, as did the respondent in the *Krueger* case; rather, the respondent herein indicated he wanted and needed counsel to help him protect his rights against self-incrimination. The ambiguity, if any, is to be found not in his request for counsel, but in the scope of that request.

A growing number of courts have adopted a third approach to the effect that an equivocal or ambiguous request for counsel requires the cessation of all interrogation except for narrow questions designed to clarify the accused's desire for counsel. For example, in the case of *Thompson* v. *Wainwright*, 601 F.2d 768 (5th Cir. 1979), the Court held that, "whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject, and one subject only. *Further questions thereafter must be limited to clarifying that request* until it is clarified." *Thompson, supra*, at 771 (emphasis added). See also *United States* v. *Riggs*, 537 F.2d 1219 (4th Cir. 1976); *United States* v. *Prestigiacomo*, 504 F.Supp.681 (E.D.N.Y. 1981); *State* v. *Moulds*, 673 P. 2d 1074 (Idaho App. 1983); *Daniel* v. *State*, 644 P.2d 172 (Wyo. 1982).

In the case at bar. there was no attempt on the part of the Wallingford Police to clarify the request of the respondent or to explore his interest in having counsel. Rather, the Wallingford Police attempted to capitalize on the respondent's naivete and inexperience in dealing with the police by immediately taking an oral statement and then quickly reducing the statement to writing in their own reports. At one point, the Wallingford Police attempted to

change the respondent's mind with regard to giving a written statement. (J.A. at 98A) Indeed, the unsuccessful attempt to tape-record the respondent's statement without so informing him after the respondent indicated that he wanted to make no permanent record prior to speaking with counsel evidences an intentional disregard of the respondent's rights. Respondent, having expressed an interest in asserting his right to counsel was entitled to a cessation of all questioning except at a minimum those questions which narrowly attempted to clarify his request.

In the *Brief of Amici Curiae*, it is argued that upholding the respondent's position could result in an innocent defendant being imprisoned in his own rights. See *Brief of Amici Curiae Alaska, et al.*, 11-13. This is not a fair argument. The respondent does not contend that there can be no valid waiver of his rights. The respondent only contends that if the request is ambiguous or the scope of the request is ambiguous, then the law enforcement officers have a duty to clarify that request prior to proceeding with any interrogation. Moreover, if the right to counsel is invoked, that right can be waived by a criminal defendant so long as the criminal defendant is the initiator of subsequent conversations.

IV. THE CONNECTICUT SUPREME COURT DECISION PROPERLY MAINTAINS THE BALANCE BETWEEN THE COMPETING INTERESTS OF PROTECTING AN ACCUSED'S RIGHTS AND OBTAINING EVIDENCE FROM THE ACCUSED.

Recent decsions of this Court regarding Fifth Amendment rights have focused on the purposes and goals of the *Miranda* and *Edwards* decisions. This Court has recognized the need to balance the protection of an accused's rights under the Fifth Amendment against the legitimate

interests of law enforcement officers in attempting to solve crimes. See *Moran* v. *Burbine*, 106 S.Ct.1135 (1986); *New York* v. *Quarles*, 467 U.S. 649 (1984).

It is submitted that to hold that the respondent in this case has not invoked his right to counsel would be to undermine the balance which has been created in previous decisions. The request of the respondent underscores the essence of an accused's right to counsel.

In the case at bar, the respondent knew and wanted counsel to assist him in the protection of his rights. The dichotomy that respondent drew between a written statement and an oral statement indicates an obvious lack of understanding of the police process. Indeed, this is precisely the type of distinction that an accused, such as the respondent, with no previous arrest record would need the assistance of counsel to draw.

Moreover, the petitioner's argument allows the law enforcement officer to interpret the respondent's request as narrowly as possible. It then allows the law enforcement officer to circumvent the intent and purpose of not only the respondent's request but of his constitutional right to counsel.

The petitioner's argument, rather than perpetuating the balance between an accused's constitutional rights and the legitimate interests of law enforcement officers, encourages law enforcement officers to circumvent a request which is legitimately intended by an accused to obtain for himself the assistance of counsel.

We urge this Court to maintain the balance which has always been at the heart of the *Miranda* decision. A ruling that allows law enforcement officers to capitalize on ambiguities or limitations in an accused's request for counsel does not honor that balance.

An accused, after invoking these rights either in a clear or ambiguous fashion, may of course waive those rights under *Edwards* if the accused initiates further conversations. The police, however, should not be insulated from their obligation to cease interrogation merely because an accused's request for counsel is less than all-encompassing.

V. THE STATEMENTS OF THE RESPONDENT WERE NOT VOLUNTARY.

While it was unnecessary for the Connecticut Supreme Court to reach the issue of voluntariness as a result of its ruling, it is submitted that the trial Court erred in determining that the statements of the defendant were voluntary.

An accused cannot waive his right to counsel or his right against self-incrimination unless under all of the facts and circumstances, that waiver is knowingly and intelligently made. *North Carolina* v. *Butler*, 441 U.S. 369 (1979); *Johnson* v. *Zerbst*, 304 U.S. 458 (1937). The trial Court, in its ruling, failed to discuss at least two important factors which it should have taken into account in determining whether or not the respondent knowingly and intelligently waived his right to counsel and his right against self-incrimination.

First, nowhere in the trial Court's ruling does it appear that the respondent's lack of experience in dealing with the police was considered. The record is clear that the officers knew that the respondent had never been arrested before, and yet this finding is notably lacking in the trial Court's ruling.

Moreover, the trial Court fails to give any consideration to the substantive significance of the respondent's distinc-

tion between an oral statement and a written statement. (J.A. at 70A, 71A) His statement indicates a lack of understanding of his rights and of the police process. The trial Court should have considered these factors and weighed them in connection with the other pertinent facts bearing on the voluntariness issue. The respondent had been in a physical altercation almost immediately before having been taken into custody. (TR. 238) The New Haven police officer who first approached him stated that he was "walking slowly, as if staggering." (TR. 238) The injuries to his eyes, face and hands were readily observable. The medical evidence indicated that the injury to the respondent's eye was a bi-lateral subconjunctive hemorrhage. (TR. 588). The respondent was offered no medical attention until after he had been interrogated on the morning of October 24, 1980 between the hours of 7:00 and 9:00 a.m. (J.A. at 29A) The respondent's physical injury was serious enough to require hospital treatment which he had received only after his statement had been taken. (J.A. at 29A) The respondent had been taken to a small room after having been awake all night and was confronted by three experienced police officers. (J.A. at 20A, 50A) His comment that he wanted to make no written statement without consulting with counsel was virtually ignored by those officers, at least with regard to its substantive significance.

It is submitted that on all facts, the trial Court erred in determining that the statements that were elicited were voluntary. At a minimum, the trial Court erred in failing to consider the lack of experience of the respondent in dealing with the police and the statements he made concerning the request for counsel in determining whether or not the respondent had knowingly and voluntarily waived his rights.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Connecticut Supreme Court.

Respectfully submitted,

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